UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORRECTIONS CORPORATION
OF AMERICA

and Case 26-CA-23180

VEVRIA NELSON

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

This case concerns the discharge of Vevria Nelson, an employee who brought to Respondent's attention complaints that she and other nurses had regarding discrimination and harassment by a supervisor, pay disparity and Respondent's bonus policy. These issues were litigated before Administrative Law Judge William N. Cates on January 5 and 6, 2009. On March 27, 2009, the judge issued his Decision finding that Respondent's termination of Nelson violated Section 8(a)(1) of the Act. On May 1, 2009, Respondent filed 56 exceptions to the judge's decision. It is the position of the Counsel for the General Counsel that the judge's decision is fully supported by the credible record evidence and case law and that the Board should affirm the judge's rulings, findings, conclusions, and recommended Order.

II. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS

Respondent's 56 exceptions essentially raise two issues:

(1) Whether the record supports the judge's conclusion that the General Counsel established a prima facie case of unlawful discrimination; and

(2) Whether the record evidence supports the judge's conclusion that the Respondent failed to meet its burden of proving that it would have terminated Nelson even if she had not engaged in protected concerted activities.

III. SUMMARY OF FACTS

The facts in this case are set forth in great detail by the judge in his decision, but are briefly summarized here. Respondent operates a correctional facility in Tutwiler, Mississippi where Vevria Nelson was employed in the medical department as an LPN/infection control nurse from January 24, 2007 until her termination on August 1, 2008 (JD 2:20; 3:25-35).

During the five months preceding her termination, Nelson engaged in protected concerted activity regarding three issues. First, on February 26, 2008,[1] Nelson wrote a grievance accusing Supervisor Albert Maples of race and gender discrimination. While Nelson was preparing the grievance, three LPN coworkers came to her office where they discussed work-related complaints regarding Supervisor Maples. At Nelson's invitation, the LPNs reduced their complaints to writing and Nelson attached them to her grievance before submitting it to Respondent. Respondent's managers met with Nelson on five occasions to discuss the grievance. During one of the meetings, Senior Human Resources Director Cindy Koehn told Nelson that Respondent eventually got rid of

[1] Unless otherwise indicated all dates are in 2008.

"troublemakers." In a May 14 letter to Nelson, Managing Director Jack Garner denied the grievance at the final step of the grievance process (JD 3:40- 9:45).

The second issue Nelson raised concertedly was the pay disparity between LPNs and RNs, and seeking a $5 pay increase for LPNs. She addressed this in a May 2008 letter she drafted and sent to Vice President of Health Services John Tighe. Prior to mailing the letter, Nelson solicited and obtained the signatures of 15 nurses who read the letter (JD 10:5-15). The letter was sent to Respondent's corporate office by certified mail with the return receipt reflecting Nelson's name and home address.

Finally, in late July, Nelson brought attention to Respondent's exclusion of LPNs from its bonus policy. On July 24, after learning that LPNs were excluded from Respondent's retention bonus policy, Nelson invited three LPNs to accompany her to raise the issue with Recruitment Specialist Nicole Carter. The LPNs agreed and the four met with Carter and Director Cindy Koehn to find out why LPNs were excluded from the retention bonus. Nelson was the only employee who spoke during the meeting (JD 10:20-40).

On July 30, Nelson and two of her coworkers had a second discussion with Carter and Koehn about bonuses.[2] During the meeting, Nelson also asked Director Koehn about the status of the letter she and the other nurses wrote to Vice President Tighe (JD 10:45-11:15). Koehn assured Nelson that she would check on the letter and get back with Nelson.

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[2] On this date the employees initially spoke with Human Resources Manager Victoria Holly about why they had been excluded from the bonuses. However, Carter interrupted the meeting and suggested that the group meet with her and included Koehn by speaker telephone.

Two days later, facility head Warden Robert Adams terminated Nelson. During the termination meeting, Adams referred to a written "talking points" document specifically prepared for the meeting. He informed Nelson that she complained but was never satisfied with the company's responses to her concerns and that her attitude was inconsistent with the environment Respondent sought to maintain at the facility. (JD 11:20-40; 24:20). After Nelson declined his offer to resign, Adams terminated her. Immediately after the meeting, Nelson notified her immediate supervisor, Health Services Administrator Gloria Johnson - the highest-ranking official in the medical department – and sought an explanation for her termination. Johnson, who had not been consulted prior to the termination, responded that she did not know why Nelson had been terminated. Following a brief meeting with Warden Adams, Johnson informed Nelson that Director Koehn had something to do with the termination, adding that Warden Adams said Koehn reported that Nelson had called Koehn being negative a few times and that Nelson "incited the nurses" (JD 11:45-12:5; 24:35-38).

IV. ARGUMENTS[3]

A. The General Counsel Met His Initial Burden of Proof

In its Brief in Support of Exceptions (R Brief), Respondent argues that the judge incorrectly concluded that the General Counsel established a *prima facie* case of discrimination. Respondent attempts to support this argument by

[3] Respondent's argument that the two-member Board lacks jurisdiction to issue a final decision and order, which is premature and not an appropriate exception, is not addressed here.

asserting that: (1) the record lacks evidence that Respondent's decision-makers knew about Nelson's concerted activities when they decided to terminate her; (2) there is no evidence that Respondent harbored animus towards Nelson's concerted activities; and (3) the factors the judge relied on fail to establish a causal nexus between Nelson's concerted activity and her discharge. As will be demonstrated below, these arguments lack merit.

1. The record supports the judge's conclusion that Respondent was aware of Nelson's protected concerted activities

In analyzing 8(a)(1) situations where motive is at issue the Board applies its' *Wright Line* test. Pursuant to that test, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. This requires the General Counsel to establish protected activity, employer knowledge of that activity, and animus against protected activity. See *Saigon Gourmet Restaurant*, 353 NLRB No. 110, slip op. at 3 (2009), citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). Respondent does not contest the judge's finding that Nelson's activities of (a) filing the grievance against Supervisor Maples; (b) sending the letter to Vice President Tighe, and (c) discussing bonus issues with Company officials, were concerted (R Brief 23). However, Respondent argues there is no record support for the judge's conclusion that Respondent's managers involved in the termination decision were aware of the concerted nature of Nelson's actions. Contrary to Respondent's assertion, the record evidence supports the judge's conclusion.

a. Respondent knew the grievance was concerted

Regarding Nelson's grievance, Respondent argues that Warden Adams considered the grievance to be Nelson's "personal" grievance and that Nelson never demonstrated that she was acting on behalf of other employees during the processing of the grievance. However, Adams' self-serving characterization of the grievance is inconsistent with the evidence. The record establishes that throughout the processing of her grievance, Nelson made it abundantly clear to Respondent that her grievance was being pursued to address complaints that she *and other nurses* had regarding Maples' discriminatory conduct.

The undisputed evidence establishes that Nelson's grievance included statements obtained from other nurses making discrimination claims similar to the ones raised by Nelson (GC 2). The inclusion of statements by other nurses placed Respondent on notice that Nelson was not advocating her own "personal" cause. Nelson continued to alert Respondent of this collective concern when she submitted an addendum to the grievance to Warden Adams on March 27 that stated, "Everyone in the grievance is black. Everyone Mr. Maples has violated is black." (GC 4, JD 6:40-42).

On April 1, Nelson sent another email to Adams regarding the grievance stating, "Sir, I don't feel my rights, **nor, my co-workers rights**, have been protected (emphasis added)." (GC 5, JD 6:44-46). On April 4, Nelson sent a lengthy email to Managing Director Jack Garner about the grievance that stated, "**We** ask Mr. Maples be placed on administrative leave until he receive (sic) conselling (sic) and supervisor training (emphasis added)." (GC 6). When Garner asked Nelson who the word "we" referred to, Nelson responded in clear

and unmistakable terms that it referred to the other nurses who attached statements to the grievance (JD 7:14-19). As Adams and Garner were involved in the termination decision, this evidence leaves no doubt that Respondent's decision makers knew the grievance was concerted. *Oakes Machine Corp.*, 288 NLRB 456 (1988) (reasonable person would conclude that letter of that consistently used term "we" was the product of more than one person); *Dickens, Inc.*, 352 NLRB 667 (2008) (employee used word "we" when complaining about bonus).

b. Respondent knew the Tighe letter was concerted

Also lacking merit is Respondent's contention that the record does not support the judge's finding that the Respondent was aware of Nelson's efforts regarding the letter to Vice President Tighe regarding wages. The undisputed evidence shows that Nelson drafted the letter, obtained the signatures of several nurses, and mailed it to Respondent's corporate office. The certified return receipt contained Nelson's name and address – a clear signal to Respondent that the letter originated with her. It is undisputed that Nelson received the certified receipt card showing that the letter was delivered to Respondent. Similarly, it is also undisputed that when Nelson met with Director Cindy Koehn on July 30 to discuss bonuses, she asked Koehn to find out what was happening with the letter and Koehn agreed to do so. (GC 9, GC 10, JD 10: 3-16).

Respondent claims that knowledge is lacking because no direct evidence exists that the managers who decided to terminate Nelson were aware of the letter. Even if this were true, the absence of direct evidence is not dispositive since knowledge of protected activity may also be established based on

circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Needell & McGlone*, 311 NLRB 455 (1993). A reasonable inference can be drawn that the decision-makers were aware of the letter based on the reasons Respondent stated for discharging Nelson. During Nelson's termination meeting, one of the reasons cited by Warden Adams for the discharge was that Nelson complained (JD 11:25-26, 24:18-20). The letter to Tighe was one in a series of complaints and group concerns Nelson raised with Respondent shortly before her termination. Thus, under the circumstances an inference of knowledge is warranted.

c. Respondent knew Nelson's conduct on July 30 was concerted

Respondent's assertion that it was unaware that Nelson was engaging in concerted activity on July 30 is unsupported by the record. The July 30 discussion was a continuation of Nelson's July 24 concerted conduct, which Respondent apparently does not dispute. On July 30, Nelson and LPN Brown met with Human Resources Manager Victoria Holly to ask if their names were included in the group of nurses who were to receive bonuses. When Holly asked what bonuses, Nelson replied "some of the LPNs are getting some extra money. We want to know are we going to get it." Recruitment Specialist Carter joined the conversation and told Nelson and Brown that questions about bonuses should be directed to Director Koehn. Carter then called Koehn by speakerphone, LPN Thomas (who had been present during the July 24 bonus discussion) joined the meeting, and a discussion ensued regarding bonuses. During the meeting, Nelson questioned Koehn about the status of the letter the LPNs sent to Tighe about pay rates for LPNs and Koehn promised to look into it. (JD 10:43-11:1-18).

Despite Respondent's initial concession that Nelson engaged in concerted activity on July 30 during conversations with company officials about bonuses for nurses, Respondent contends that it perceived Nelson as acting on her own behalf because she and the other participants inquired as to whether they, personally, would receive a bonus. It also asserts that Nelson ever acted as the group's spokesperson. In this regard, Respondent relies exclusively on testimony by LPN Dieketra Thomas that Nelson was never *designated* as the group's spokesperson during the July 30 meeting and that the participants asked whether they were personally getting bonuses. However, these factors do not negate a finding that Nelson was engaged in concerted activity. For example, in *Salisbury Hotel*, 283 NLRB 685 (1987), the lack of specific authorization did not prevent the Board from finding protected concerted activity by an employee who, during a meeting, objected to supervisor's comments about work-related matter. See also, *American Red Cross*, 322 NLRB 590 (1996) (employee's statements about working conditions constituted concerted activity because statements made in presence of other employees).

Alternatively, Respondent argues that even if it perceived Nelson's conduct as concerted activity, there is no evidence that the managers who made the decision to terminate Nelson were aware of the July 30 meeting. Again, the record does not support Respondent's assertion. Recruitment Specialist Carter testified, without contradiction, that she met with Warden Adams less than thirty minutes after the meeting and provided him with a detailed account of Nelson's

conduct during the meeting (Tr. 422-424). Thus, Respondent was aware that Nelson had engaged in concerted activity on July 30.

Accordingly, the evidence overwhelmingly supports the judge's conclusion that managers involved in the decision to terminate Nelson had knowledge of her protected concerted conduct. Specifically:

- The grievance against Maples clearly reflects a group concern and her responses to Warden Adams and Director Garner throughout the processing of the grievance establish that she was acting on behalf of the group.
- Carter informed Adams about Nelson's conduct during the July 30 meeting.
- Nelson testified without contradiction that Health Services Administrator Johnson acknowledged that Human Resources Director Koehn had something to do with Nelson's termination because Koehn reported to Warden Adams that Nelson contacted Koehn and incited the nurses.
- Warden Adams referred to Nelson's complaints during the termination meeting, which took place two days after Nelson inquired about bonuses and the letter to Tighe.

Under these circumstances, the Board should affirm the judge's finding that the Respondent was aware of Nelson's protected concerted activities.

2. The judge properly found that Nelson's termination was unlawfully motivated

In cases like this one where an employer's motivation for a personnel action is in issue, the Board has held that a finding that the discharge of an employee was unlawfully motivated is supported by a number of factors including: the stated reason for the discharge; statements showing animus towards an employee's protected concerted activity; the timing of the discharge; reliance on stale incidents; and disparate treatment. *Connecticut Hospice, Inc.*, 342 NLRB 23 (2004); *Air Flow Equipment, Inc.*, 340 NLRB 415 (2003). If these elements are met, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Id.*

Here, the judge based his finding that Nelson's termination was unlawfully motivated on the following undisputed facts:

> 1. The written "talking points" document that Warden Adams referred to when he met with Nelson to discuss the reasons for her termination indicates that Nelson complained and was never satisfied with any response by Respondent to her concerns. The judge noted that Nelson's concerns included race and gender discrimination, as well as wage rate and bonus issues.
>
> 2. During the termination meeting, Warden Adams told Nelson that her attitude did not fit the environment Respondent sought to establish and maintain.
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> 3. On March 14, during a meeting regarding the grievance Nelson filed against Supervisor Maples for race and gender discrimination, Director Koehn told Nelson that Respondent eventually got rid of troublemakers.
>
> 4. Immediately after Nelson's discharge meeting, Administrator Johnson told Nelson that Warden Adams spoke to Director Koehn and was told that Nelson called being negative a few times and that she incited the nurses.

5. Nelson was terminated a mere two days after she discussed with Director Koehn employee bonuses and the status of a letter she wrote to Vice President Tighe regarding a wage increase for LPNs.

6. Nelson was terminated for something other than her job performance or abilities since her immediate supervisor, Administrator Johnson, wrote Nelson a letter of recommendation describing her as "an excellent nurse" with a "wealth of knowledge" and a "self motivated" "model employee". (JD 24:15-25:5).

Despite the presence of this compelling and undisputed evidence, Respondent asserts that the judge erred because none of the above factors supports a finding that Nelson's discharge was unlawfully motivated. As discussed below, Respondent's assertion is flatly wrong.

a. Warden Adams' statements and reference to the "talking points" document establish animus

It is undisputed that when Warden Adams discharged Nelson, he used a "talking points" document that set forth Respondent's reasons for terminating Nelson. The document indicates, among other things, that Nelson voiced complaints to Respondent about issues and was never satisfied with the responses Respondent gave to her concerns. Thus, the "talking points" document establishes that Nelson's concerted activity was a motivating factor in her discharge. Furthermore, by telling Nelson that she made complaints but was never satisfied with the company's answers, Adams connected Nelson's discharge to her protected concerted activities. *Alstyle Apparel,* 351 NLRB 1287 (2007) (unlawful motive revealed by disciplinary memo stating employee incited the group).

In addition to identifying her prior complaints as a cause for the discharge, Warden Adams also admitted that he told Nelson in the discharge meeting that

he thought she had a "negative attitude" (Tr. 270). The Board considers similar comments, such as accusing an employee of having a "bad attitude," to be a veiled reference to the employee's protected activities. *Frye Electric, Inc.*, 352 NLRB 345, 353 (2008); *Rock Valley Trucking Co.*, 350 NLRB 69 fn. 6 (2007); *Climatrol, Inc.*, 329 NLRB 946 fn. 4 (1999); Respondent attempts to diminish the significance of Adams' statement about Nelson's "negative attitude" by arguing that it was merely a reference to Nelson's "belligerent and bullying attitude toward her coworkers and supervisors." However, this argument is unpersuasive since that is not what he said.

b. Respondent's troublemaker statement establishes animus and unlawful motivation

Respondent also argues that Director Koehn's statement to Nelson that Respondent got rid of "troublemakers" is not indicative of an unlawful motive. However, Respondent cites no case law to support its position and simply contends that the judge misinterpreted the remark. The Board should reject this argument since it is unsupported by the record. During the March 14 grievance meeting with Warden Adams and Director Koehn, Nelson responded to Maples' grievance answer by telling Koehn that Maples and Nelson's coworkers tried to paint Nelson as a troublemaker and that this characterization was unwarranted. It is undisputed that Koehn did not deny the characterization of Nelson as a troublemaker, but instead replied unambiguously that Respondent "eventually got rid of troublemakers." (Tr. 40, 42-44, JD 6:26-35).

Board law supports the judge's conclusion that Koehn's remark evidenced animus and demonstrated unlawful motivation for discharging Nelson. Terms

such as "rabble-rouser", "agitator" and "troublemaker" are normally applied by an employer to individuals who are attempting to instigate other employees to engage in concerted activities. *All Pro Vending*, 350 NLRB 503, 507 (2007). The Board has also found that calling an employee a troublemaker and threatening to terminate troublemakers is evidence of animus. *New Haven Register,* 346 NLRB 1311 (2006); *Knoxville Distribution Co.*, 298 NLRB 688 (1990), enfd. 919 F.2d 141 (6th Cir. 1990 Table) (employer's comment that it did not need troublemakers evidenced animus); *United Parcel Service*, 340 NLRB 776, 777 fn. 10 (2003) (employer's animus demonstrated by manager's statement to discriminatee that he was a troublemaker for filing grievances). Here, Koehn expressed hostility towards Nelson's protected activity when she told Nelson that Respondent would get rid of troublemakers. Because the statement was made in the context of a meeting to discuss Nelson's grievance, the implication of Koehn's statement was that Nelson's activity was inconsistent with continued employment at Respondent's facility. Moreover, Warden Adams was present during the meeting and did not refute Koehn's statement or provide any context for it. Director Koehn's threat eventually became a reality when Respondent fired Nelson for her concerted activities a few months later. Thus, the Board should find the statement especially persuasive evidence" that Nelson's discharge was unlawfully motivated. See, *Overnite Transportation Company*, 343 NLRB 1431, 1436-1437 (2004), citing *Turnbull Cone Baking Co. of Tennessee v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (citing cases), cert. denied 476 U.S. 1159 (1986) (where an employer's representatives have announced an intent to discharge or

otherwise retaliate against an employee for engaging in protected activity, the Board has before it "especially persuasive evidence that a subsequent discharge of the employee is unlawfully motivated.

Respondent's argument that the judge placed too much importance on Nelson's testimony and the import of Koehn's statement should be rejected since neither Warden Adams, nor Director Koehn, denied the statement or provided any clarity regarding its meaning, when they testified.

c. Health Services Administrator Johnson reveals Nelson's discharge was unlawfully motivated

Respondent asserts that the judge improperly relied on testimony by Nelson regarding a conversation she had with her immediate supervisor after Nelson's termination. Nelson testified *without contradiction or objection* that immediately after the termination meeting with Warden Adams, she met with Administrator Johnson - an admitted Section 2(11) supervisor - to inform her of the termination. It is undisputed that Johnson, who was never consulted regarding the discharge, left Nelson and went in the direction of Warden Adams' office to find out why Nelson was terminated. According to Nelson, who testified in a straightforward manner, upon Johnson's return, Johnson informed Nelson that Director Koehn had something to do with the termination. Nelson further testified that Johnson told her that Adams said that Koehn told Adams that Nelson had called Koehn "being negative a few times" and that Nelson "incited" the other nurses. (JD 11:43-12:1-11).

Respondent's counsel never objected to this testimony and, without explanation, failed to call Administrator Johnson, who was still employed by

Respondent, as a witness to refute Nelson's testimony. Also telling is the fact that Warden Adams and Director Koehn – both of whom were called by Respondent to testify – never denied the statements attributed to them. Surprisingly, Respondent now contends that Nelson testimony was "quadruple hearsay testimony" and, consequently, the judge's reliance on it was improper. This contention lacks merit.

First, since Respondent did not specifically object to Nelson's testimony on hearsay grounds at the hearing, Respondent has effectively waived its right to now object to the testimony on hearsay grounds. See *NLRB v. Cal-Marine Farms*, 998 F.2d 1336, 1343 (5th Cir. 1993). Further, even if the claim was not waived, the statement about which Nelson testified was made directly to Nelson by Respondent's administrator - an admitted Section 2(11) supervisor. Therefore, contrary to Respondent's contention, Johnson's statements are attributable to Respondent as a party admission and are not barred by the hearsay rule. Fed. R. Evid. 801(d)(2); *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (statement by Respondent's agent to employee regarding statement by plant manager and employee relations manager not hearsay but admission by party-opponent). Accordingly, the judge's reliance on Nelson's testimony was proper.

d. The timing of Nelson's discharge establishes unlawful motivation

Contrary to Respondent's contention, the judge also properly found that the timing of Nelson's termination was suspicious and indicative of an unlawful motive. To support its claim, Respondent implies that the timing of Nelson's termination was not suspicious because the actual discharge decision was made

on July 30, before Nelson engaged in concerted activities that day. Respondent's claim is patently false. An examination of the record reveals no evidence that the discharge decision was made on July 30 as Respondent claims. Warden Adams was unable to recall the exact date upon which he decided to terminate Nelson. At the hearing, when asked to specify the date of the discharge decision, Adams' initial response was, "I don't recall the exact date." He was then shown a copy of Nelson's termination letter and asked whether it refreshed his memory of the date. Adams replied, "Not the exact date no." When asked to provide an approximate date, Adams replied, "The date of, like I say, it was between the 29th and the 31st of July. I don't know. I can't give you the exact date. I don't recall the exact date." (Tr. 286-287). There is simply no basis to conclude that the decision was made on July 30 as Respondent asserts. Accordingly, Respondent's argument should be rejected.

While the exact date of the discharge decision is unknown, it is undisputed that Respondent discharged Nelson two days after her July 30 discussion with Director Koehn about bonuses and the status of her letter to Vice President Tighe (JD 24:44-46). As the judge correctly found, the timing of Nelson's discharge is highly suspicious and undoubtedly shows that the discharge was unlawfully motivated (JD 24:46-25:1). The judge's finding is supported by a host of Board cases. See, e.g., *Dickens Inc.*, 352 NLRB 667 (2008) (discharge two days after complaints about bonus rates); *Connecticut Hospice*, 342 NLRB 23 (2004) (discharge one month after protected activities); *USF Dugan*, 332 NLRB 409 (2000) (discharge within months of protected activity). Respondent's

reliance on *Frierson Building Supply Co.*, 328 NLRB 1023 (1999), is misplaced since, unlike that case where timing was the only factor suggesting unlawful motive, here there is an abundance of other evidence to show that the discharge of Nelson was unlawfully motivated.

d. The letter of recommendation establishes unlawful motivation

Respondent also attacks the judge's finding that Administrator Johnson's letter of recommendation was indicative of an unlawful motive. Citing no case law, Respondent claims that the judge's reliance on the letter of recommendation was unjustified given the fact that Johnson and Nelson were close friends and Johnson's views of Nelson were not considered by the managers who made the discharge decision. This argument is unpersuasive.

Regarding the friendship argument, there is no record evidence that Johnson's purported relationship with Nelson influenced her to write the recommendation. Respondent could have called Johnson to testify at the hearing about the nature of her relationship with Nelson or her motivation for writing the letter but, surprisingly, it chose not to do so. What the undisputed record evidence reveals about the letter is that Nelson simply contacted Johnson, asked her to write a letter of recommendation and Johnson agreed to do so (JD 14:18-31, Tr. 87:1-17). There is no evidence that Johnson's agreement to write the letter was obtained by coercion or that Nelson dictated the terms of the letter – facts which, if existed, would render the letter unreliable.

It is also undisputed that Johnson's recommendation letter describes Nelson as an "excellent nurse" and a "model employee" (JD 25:1-4, GC Exh 19). The views of Nelson expressed in the letter are entirely consistent with Nelson's

final evaluation, which indicated that she was "respectful of her co-workers and always tried to build positive relationships" (GC Exh 17), and approved by Warden Adams a few months before Nelson's termination. Adams' approval of the evaluation significantly weakens Respondent's argument that the views expressed in the reference letter do not reflect the views of those involved in the termination decision. Moreover, the recommendation letter and the evaluation directly contradict Respondent's unfounded and distorted portrayal of Nelson as a bully and a threat to the California contract. This glaring inconsistency shows that Respondent's discharge was unlawfully motivated.

e. Other evidence confirms that Nelson's discharge was unlawfully motivated

In addition to the enumerated factors relied on by the judge to support his conclusion that Nelson's discharge was unlawfully motivated, Respondent's admitted failure to consult Administrator Johnson prior to discharging Nelson provides further proof of Respondent's unlawful motive. The Board considers an employer's failure to consult an employee's immediate supervisor before disciplining the employee as evidence of unlawful motivation. *Lancer Corp.*, 271 NLRB 1426, 1427 (1984), enfd. 759 F.2d 458 (5th Cir. 1985) ; *Williams Services*, 302 NLRB 492 (1991). Here, it is undisputed that Respondent made the decision to terminate Nelson without consulting Nelson's immediate supervisor (Tr. 254). The exclusion of Johnson from the decision-making process indicates that Respondent had an unlawful motive when it terminated Nelson.

B. Respondent Failed to Prove it Would Have Discharged Nelson Absent Her Protected Concerted Activity

Respondent argues that General Counsel failed to prove his case, asserting that Respondent did not harbor animus towards Nelson's protected concerted activities. To support its argument, Respondent notes that other nurses raised issues about bonuses and also signed Nelson's May 2008 letter to Vice President Tighe and were not threatened, disciplined or terminated for doing so. Respondent also asserts that other employees have utilized its grievance process without retribution, and claims that animus is lacking since Nelson was terminated five months after her February 26 grievance was filed. None of these arguments warrant reversing the judge's findings.

The fact that Respondent did not discipline other nurses who inquired about bonuses and/or signed the May 2008 letter does not preclude a finding that Nelson's discharge was unlawfully motivated. The evidence is clear that Nelson was the moving force behind the protected concerted activity at the facility and Respondent was fully aware of this. It is undisputed that Nelson initiated filing a class action grievance regarding the discriminatory conduct of Supervisor Maples and was threatened with discharge during a grievance meeting (JD 5:5-12, 6:26-35). Nelson was undeterred by the threat and continued to aggressively pursue work-related concerns on behalf of other nurses. After the threat was made, Nelson initiated two group meetings with Respondent to discuss LPN bonuses; questioned Respondent's rationale for not paying retention bonuses to LPNs; drafted, solicited signatures on, and mailed a letter to Respondent's corporate office to complain about the disparity between RN and LPN pay and to request a pay increase for LPNs; and subsequently inquired about the status of the letter

(JD 10:3-11:1-18, 22:27-23:15). No other nurses were shown to have engaged in protected activities with the same degree of frequency and forcefulness as Nelson. Respondent's displeasure with Nelson's concerted conduct, and her ability to rally the nurses around various work-related causes, ultimately led Respondent to discharge her. It was Nelson who *incited* the nurses.

Even though Respondent took no action against other LPNs who participated in the group meetings with Nelson, signed Nelson's letter or filed a grievance, it is well settled that when a discriminatory motive is proved, it is not disproved by an employer's proof that it did not weed out all of the employees who engaged in the activities that displeased it. *Nachman Corp. v. NLRB,* 337 F.2d 421, 424 (7th Cir. 1964); *Audubon Regional Medical Center*, 331 NLRB 374, 376 (2000); *Igramo Enterprise*, 351 NLRB 1337, 1339 (2007).

Once it is established that protected activity was a motivating factor in a discharge decision, the burden of persuasion shifts to the employer to prove that the discharge would have occurred even in the absence of the protected concerted activity. *Igramo Enterprise*, supra. The judge had an ample evidentiary basis to conclude that Respondent failed to prove that it would have discharged Nelson absent her protected concerted activities. Nevertheless, Respondent contends that the judge erred in reaching this conclusion because Nelson admitted she engaged in misconduct, there is no evidence of disparate treatment, and the stated reason for Nelson's discharge was not pretextual. These arguments lack merit.

1. Nelson never admitted engaging in misconduct

Respondent first contends that it satisfied its burden of proof because Nelson admitted that she engaged in misconduct. Respondent's contention grossly misstates the evidence. Nelson never admitted that she engaged in misconduct at any time before or after her termination. It is undisputed that during the termination meeting, Warden Adams told Nelson that she made complaints but was never satisfied with Respondent's answers; that Respondent received complaints, some of which were from Nelson's coworkers; and that Nelson blamed others for her problems but she was never at fault. Warden Adams also said that Respondent was trying to secure the California contract and that Nelson had an important position at the facility. Adams said Respondent had decided to move forward and that Nelson's attitude did not fit with the environment of the facility. Adams then gave Nelson two choices – either resign or be terminated – and asked her whether she had anything to say (JD 11:22-41, Tr. 71-72).

Nelson responded by telling Adams that she did not understand and asking him to explain what he was talking about. Adams did not respond. Nelson then asked Adams why she never received counseling if people had complained. Adams repeated that Nelson had two options – either resign or be terminated. Nelson asked why she was just hearing that people complained about her. Adams responded that he could not reveal who complained and Nelson replied that she was not asking who complained, but merely why she was just hearing about the problem if it was so detrimental. Adams repeated that Nelson could either resign or be terminated. Nelson asked why her supervisor

was not present if the matter was so serious. Adams repeated Nelson's two options. Nelson said she would not resign because she had no reason to do so – a clear indication to Respondent that she disagreed with Warden Adams' actions. Warden Adams replied that she was terminated (JD 11:22-41, Tr. 71-72).

After the meeting, Nelson filed a grievance with Respondent to protest her termination – yet another clear signal to Respondent that Nelson considered herself to be innocent (JD 12:40-41). Nelson's grievance does not contain any admissions of wrongdoing (GC Exh 13). Instead, Nelson did exactly the opposite and denied Respondent's accusations (GC Exh 13). In the last paragraph of the grievance, Nelson states, in no uncertain terms, "... I did nothing to warrant this termination." (GC Exh 13). Nelson had two conversations with management about her termination grievance. In neither conversation did she admit to engaging in misconduct (JD 13:7-24).

2. Nelson was treated more harshly than similarly situated employees

Respondent argues that the judge also erred by failing to consider the lack of disparate treatment evidence. Respondent claims that there is "absolutely" no evidence that other employees who engaged in conduct similar to Nelson's were treated more favorably. In support of this claim, Respondent points out that, like Nelson, it has discharged employees for violating the Code of Conduct.

A review of the record reveals that Respondent terminated three employees prior to Nelson's termination for Code of Conduct violations (R 48.45, 48.90, 48.112). However, these records are irrelevant because the discharges were precipitated by significantly different infractions. For example, one

employee was discharged for job abandonment and two other employees were discharged for failing to follow a supervisor's orders. Therefore, these records do not establish the lack of disparate treatment. *U.S. Recycling and Disposal*, 351 NLRB 1090 (2007) (rejecting employer's claim that disparate treatment was lacking).

On the other hand, the record is replete with evidence that Nelson was treated more severely than numerous other employees who violated the Code of Conduct by being either disruptive, argumentative or engaging in bully-like tactics – the infraction for which Respondent asserts it terminated Nelson. In fact, the record shows that on numerous occasions Respondent issued discipline well short of termination for employee misconduct that was far more egregious than that for which Nelson was accused.

For example, on February 13, 2007 Gloria Stokes was disciplined for insubordination and unprofessional conduct. Stokes' supervisor requested that Stokes remain at her post. Stokes got angry and approached her supervisor in an unprofessional manner and insisted that the supervisor not yell at her. The supervisor apologized and Stokes degraded other supervisors and commented that her supervisor was a "d--k sucking b----, walking around here f---ing everything at the facility." In the problem solving notice, the supervisor recommended that Stokes be discharged "because [Stokes] was unprofessional and in the present (sic) of other staff members, this is not the first time she did this to me." Respondent ignored the supervisor's discharge recommendation and only issued a two-day suspension (R Exh 48.108).

In March 2007 employee Olivia Moore's supervisor instructed her to dispose of a microwave meal box before passing through the checkpoint. Upon receiving the instruction, Moore became belligerent and grossly insubordinate by walking off and stating to her supervisor, in the presence of other employees, "This mother f---er going to make me curse his ass out around here. He think he is the got damn warden around here." Respondent gave Moore only a one-day suspension for her conduct (R Exh 48.20).

In August 2007, Ketius Jackson was disrespectful to her supervisor when she refused to perform an assigned task. Her supervisor tried to use the phone to call Assistant Warden Arguijo. Jackson pulled the phone away and said this was her office and the supervisor could not use it. The supervisor wrote a statement regarding the incident because Jackson had been disrespectful on several occasions. For this transgression, Jackson received only a written reprimand from Warden Adams (R Exh 48.57).

On January 21, 2008, Denise Pollard was disciplined for multiple violations of Policy 3-3 of the Code of Conduct, all committed during a single day. Pollard abandoned her post without being relieved. When confronted about her misconduct, Pollard told her supervisor, "Damn you." Another supervisor confronted Pollard regarding her comment and Pollard continued to use profanity towards her supervisor. Pollard's supervisor told Pollard that she needed to meet with the warden and Pollard replied, "F--- you." Before leaving, Pollard threatened to inflict harm upon her supervisor if she saw him in the streets.

Despite a recommendation from the supervisor to discharge Pollard, Adams only issued Pollard a one-day leave without pay (GC Exh 65).

On January 28, 2008, Terrance Tyler received a written reprimand to for saying in front of a supervisor and inmates, "F--- this s---. Fuck everybody. This is bull s---." The supervisor tried to convince Tyler to quit but "he just cursed and got louder." (R Exh 48.60).

Demetrica Levy was disciplined for insubordination and unprofessional behavior on January 23, 2008. Her supervisor asked her to work an extra hour of overtime and Levy refused. Levy was told that if she left the facility she would be required to leave her badge and to discuss the matter with the warden the next day. Levy replied, "I'm not giving you s--- and you can kiss my butt." Although Levy's supervisor recommended that Levy be terminated, Adams issued her a written reprimand (GC Exh 66.1, R Exh 48.66).

Levy engaged in disrespectful and insubordinate behavior four months later when she received an order to serve food to the inmates. In response to this directive, Levy replied, "I ain't doing nothing. I ain't thinking about what you saying. You can shut up. I (sic) not going in no unit feeding no inmate." On May 12, 2008, Adams suspended Levy one day for her conduct (GC Exh 66.2). Four days later, Levy violated the Code of Conduct again when she responded to her supervisor's directive to report to a post with profane language. Adams only issued Levy a written reprimand for this conduct (GC Exh 67.1). Twelve days later, Levy engaged in similar misconduct. Levy's supervisor asked her to remove a protective spray from her back pocket and place it in her front pocket.

Levy replied in a rude tone that he could not "tell her s---" and walked off. Levy later returned and told her supervisor "f--- this." The supervisor again asked Levy to remove the spray device from her back pocket. Levy replied "you can't tell me s---" and walked away. For this misconduct, Levy only received a two-day suspension from Adams (GC Exh 67.3).

On July 7, 2008, less than a month before discharging Nelson, Latasha Ponds was unprofessional, loud, boisterous, and spoke out against Respondent's California customer during a conference call with the customer. Ponds' supervisor recommended that she be reassigned but Ponds received only a written reprimand (R Exh 48.85). Similarly, on January 24, 2008, LaShund McGown spoke to her supervisor in a rude and harsh tone after being asked to explain why she left her post. McGown replied by telling her supervisor, "You don't ask me my business where I going, it ain't your and nobody business to know my business. I'm grown you don't ask me where I'm going don't put my business out there like that." The supervisor recommended that Respondent suspend McGown. However, Adams only issued McGown a written reprimand (R Exh 48.100).

The above evidence clearly illustrates that Nelson's conduct was not the type of conduct that would ordinarily cause Respondent to terminate an employee. Respondent's decision to impose the harshest type of discipline on Nelson while issuing lesser discipline to employees who committed far worse infractions lends further credence to the judge's finding that Respondent did not satisfy its burden of proof in this case. *White Oak Manor*, 353 NLRB No. 83

(2009)(employer failed to rebut General Counsel's case when discharged employee subjected to disparate treatment); *Case Farms of North Carolina*, 353 NLRB No. 26 (2008) (evidence of disparate treatment precludes employer from establishing *Wright Line* defense).

3. Respondent's reason for terminating Nelson is pretextual

As indicated earlier, Respondent contends that it terminated Nelson because of her disruptive, argumentative, and bullying conduct. According to Respondent, the discharge was triggered by an incident involving Nelson and RN Dorothy Strong on July 29. Regarding the incident, Strong testified that she heard several nurses conversing at the nurses' station about an inmate's chest pains. Strong walked to the station and asked who was having chest pains. One of the nurses there said "nobody". According to Strong, Nelson was walking away from the station and stated, "That's what I say about people being nosy. Just they (sic) don't know what's going on. And they just ask questions, questions, questions." Strong claimed that the statement embarrassed her. Strong prepared a report describing the incident and submitted it to Warden Lucy Cano on July 29. Warden Adams testified that the incident came to his attention on July 29 and that he received a copy of Strong's report on July 30 (JD 18:7-18, Tr. 277, 311).

Although Warden Adams testified that he knew that he had to do something with Nelson after the Strong incident, it is undisputed that he never made Nelson aware that Strong filed the statement or registered a complaint, never interviewed Nelson before her discharge to obtain her side of the story, and never cited the incident as a reason for the discharge during Nelson's

and never cited the incident as a reason for the discharge during Nelson's termination meeting (Tr. 116-117, 137-138, 277-278). Although several nurses were present when the incident occurred, Respondent obtained only one statement regarding the incident. The witness indicated in his statement and testified at trial that, although he was there, he did *not* know what Nelson said to Strong (Tr. 321-322, R Exh 57).

In disagreement with the judge, Respondent argues that it did not seize upon the Strong incident as a pretext for discharging Nelson. However, the overall record evidence confirms that the judge was correct and that Respondent's argument lacks merit. First, contrary to its own established practice, Respondent failed to fully investigate the Strong incident before disciplining Nelson for it. In that regard, Warden Adams testified that before issuing discipline to an employee accused of misconduct, it is Respondent's practice to gather all the facts and to allow the accused an opportunity to explain his/her side of the story and that doing so is fair (Tr. 263, 266-267). Respondent, without explanation, ignored this established practice and never provided Nelson with a chance to respond to Strong's accusations. Instead, Respondent relied on an unsubstantiated claim and summarily terminated Nelson in order to put an end to her protected activities. Respondent's failure to conduct a meaningful investigation supports a finding of pretext. *U.S. Recycling and Disposal*, supra (discharge unlawful where employer accepted one version of an event without considering all the facts); See also, *Midnight Rose Hotel & Casino*, 343 NLRB 1003 (2004), affd. mem. 198 Fed. Appx. 752 (10th Cir. 2006) .

A pretext finding is also supported by Warden Adams' failure to cite the Strong incident as a reason for Nelson's discharge during the termination meeting. Even though Respondent considered the Strong incident to be a "serious" infraction, Adams never mentioned to Nelson that Strong complained, that she filed an incident report, or that Respondent was relying on that incident (as well as the other incidents) to support the discharge decision. When Nelson sought an explanation for the discharge decision, Warden Adams failed to furnish one and replied only that Nelson could either resign or be terminated (JD 11:22-41).

Respondent seeks to excuse its conduct by arguing that its customary practice during termination meetings is to refrain from reviewing each factor leading to an employee's termination. However, Respondent's alleged nondisclosure practice does not exonerate Respondent from the unlawfulness of its actions or preclude a finding of pretext. The Board has consistently held that a finding of pretext is appropriate when an employer fails to provide the specific reasons for the discharge. *Electro-Plating Specialties*, 236 NLRB 534 (1978), enfd. 603 F.2d 224 (9th Cir. 1979 Table) (pretext found when employee was discharged for use of profanity but employer failed to communicate this reason during termination meeting); *Yellow Enterprises, Inc.*, 342 NLRB 804 (2004)(asserted reason for discharge found to be false since it was never mentioned to employee as reason for discharge); *Alton H. Piester*, 353 NLRB No. 33 (2008)(employer failed to sustain burden of proof when failed to mention prior misconduct). Accordingly, the judge's finding of pretext was proper.

The judge also correctly concluded that Nelson's evaluation and her letter of recommendation from Administrator Johnson demonstrated that she was terminated for something other than her job performance. The record evidence shows that in her nearly two years of employment at the Tutwiler facility, Nelson received two performance evaluations both of which gave her an overall rating of "exceeds requirements" – the second highest of five rating categories (JD 14:15-16, GC Exh 17, 18). Nelson's most recent evaluation was prepared by Administrator Johnson and approved by Warden Adams a few months before Nelson's discharge (GC Exh 17). The evaluation specifically noted that Nelson assisted others when needed, was respectful to her co-workers, and always tried to build positive relationships (GC Exh 17). It is undisputed that Warden Adams gave Nelson a merit raise for her exemplary job performance one month before the discharge (Tr. 85-85, 260-261).

As mentioned earlier, following her termination, Nelson requested and received from Administrator Johnson a letter of recommendation for a prospective employer. The letter described Nelson as self-motivated, punctual, an excellent communicator, and an excellent nurse (JD 14:18-31, Tr. 86-87, GC 19).

Contrary to the judge, Respondent contends that a finding of pretext based on the evaluation and the letter of recommendation was unjustified. The evaluation and recommendation belie Respondent's contention. Respondent's asserted reason for discharging Nelson – that she was disruptive, argumentative, and a bully - is undercut by the evaluation and the recommendation, neither of

which use these terms to describe her or her work performance. Both documents establish that Nelson was an asset to Respondent and that the stated reason for her discharge was false. *Connecticut Hospice, Inc.*, 342 NLRB 23 (2004) (employer ignored nurse's exemplary work record and failed to carry *Wright Line* burden).

V. CONCLUSION

A review of the record establishes that the judge properly concluded that Respondent violated Section 8(a)(1) of the Act by terminating employee Vevria Nelson. Respondent presents no arguments or legal authority that would warrant reversing the judge's findings and conclusions. Accordingly, the Board should affirm the judge's findings and conclusions and should adopt his recommended Order requiring Respondent to reinstate Nelson and make her whole for loss of earnings and other benefits she suffered as a result of Respondent's unlawful conduct.

Dated: May 15, 2009

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 15, 2009, a copy of General Counsel's Answering Brief to Respondent's Exceptions was filed by e-filing with the Executive Secretary's Office on the Board's website.

I further certify that on May 15, 2009, a copy of General Counsel's Answering Brief to Respondent's Exceptions was served by email on the following:

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I further certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions was served by regular mail on May 15, 2009 on:

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